

**PATENT**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re application of:	)	Examiner: NGUYEN, Thanh T.
Robert Curley, <i>et al.</i>	)	
	)	
Serial No.: 09/740,804	)	Art Unit: 2444
	)	
Filed: 12/21/2000	)	Confirmation No.: 6420
	)	
For: <i>Methods of Determining</i>	)	
<i>Communications Protocol Latency</i>	)	
(as amended)	)	
	)	
Notification Date of Final Office Action	)	Attorney Docket No.: O226
May 18, 2010	)	

**PETITION TO DIRECTOR UNDER 37 CFR §1.181**

**(1) TO WITHDRAW PREMATURE FINAL REJECTION and**

**(2) TO PROHIBIT CONCLUSORY REJECTIONS**

Mail Stop **Petitions**  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Dear Sir:

Responsive to the Final Office Action of May 18, 2010, Applicant respectfully requests withdrawal of the Final Rejection since it is premature.

### **Remarks**

This Petition is responsive to the **May 18, 2010** Final Office Action.

Applicant petitions to withdraw the Final Rejection under 37 CFR §1.181, MPEP §1002.02(c), and MPEP §706.07(c) since the Final Rejection is premature.

In the first Office Action dated May 20, 2004, independent claim 19 and independent claim 27 were rejected under 35 U.S.C. §102(e) as being anticipated by Pruthi et al. (US Patent Application Publication No. 2002/0105911)(Pruthi).

On August 16, 2004, Applicant filed a response that did not amend claim 19 or claim 27.

The patent office then failed to respond for over 5 years.

The present Final Rejection was then issued on May 18, 2010 that withdrew the §102 rejection and then rejected independent Claims 19 and 27 based on newly cited art. In particular, the present Office Action states:

Claims 1, 3-14, 15-27 and 29-35 were rejected under 35 USC §103(a) as purportedly being unpatentable over Pruthi et al. (US Patent Application Publication No. 2002/0105911)(Pruthi), in view of Sweet et al. (Publication No. US 2003/0115266 A1)(Sweet).

### **Withdrawal of Final Rejection**

Applicant respectfully submits that the Final Rejection issued on the application is improper based on MPEP §706.07(a) and should be withdrawn.

MPEP 706.07(a) states "Furthermore, a second or any subsequent action on the merits in any application or patent undergoing reexamination proceedings will not be made final if it includes a rejection, on newly cited art, ...of any claim not

amended by applicant or patent owner in spite of the fact that other claims may have been amended to require newly cited art.”

Independent claims 19 and 27 were not amended, yet have now been rejected by newly cited art and the rejection has been made final. Thus, the Final Rejection is improper under MPEP 706.07(a) and should be withdrawn.

### **Request For Proper Examination and Prohibition of Conclusory Rejections**

The Office Action is replete with conclusory rejections with no reasoning. Only a conclusory paragraph citation is provided in many instances. Applicant requests that the examiner be required to follow MPEP rules and provide some articulated reasoning to support rejections.

For example, independent claim 27 recites:

using an HTTP initial request and reply to determine if the content of at least one web page hosted by the web server is static or dynamic.

The OA cites Pruthi paragraphs [0122-0131] (OA page 8, section 33). No explanation or reasoning is provided. Only a citation is provided. This is improper under MPEP 2142 and by the U.S. Supreme Court (*KSR International Co. v. Teleflex Inc.*, 550 U.S. \_\_\_, \_\_\_, 82 USPQ2d 1385, 1396 (2007)).

Furthermore, neither the term “static” nor “dynamic” appear in the cited text. Also, the term “page” or “web page” does not appear anywhere in Pruthi. Therefore, it is impossible for the cited text to teach or suggest determining “if the content of at least one web page hosted by the web server is static or dynamic” as recited in the claim. A prima facie rejection has not been established and the rejection should be withdrawn.

The examiner must follow MPEP rules and yet they are not followed. It is unwarranted that the applicant must file a Petition to the Director in order to get a proper examination. Conclusory rejections must be prohibited.

### **5 Years Between Office Actions**

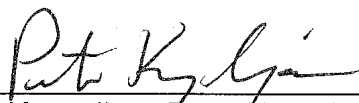
The Patent Office apparently lost the applicant's application since there was over 5 years between office actions. The First office action was issued May 20, 2004 then the next and current office action was issued May 18, 2010. This was not due to applicant's delay (see file history).

After a 5 year delay, the examiner has now issued a Final office action. This is completely unjust and unfair to the applicant considering the circumstances. The Final rejection should be withdrawn.

### **Conclusion**

For the reasons set forth above, the Final Rejection is improper and should be withdrawn. An early decision on Applicant's Petition is earnestly solicited.

Respectfully submitted,



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